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No. 94-1121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

APPLE COMPUTER, INC.,
Petitioner,

v.

MICROSOFT CORPORATION AND
HEWLETT-PACKARD COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Rule 29.1 Statement

Apple Computer, Inc. has no parent companies or subsidiaries (except wholly owned subsidiaries).

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Other Authorities:

Jack E. Brown, *"Analytical Dissection" of Copyrighted Computer Software—Complicating the Simple and Confounding the Complex*, 25 Ariz. St. L.J. 801 (1993) 9

Don Clark, *Microsoft Hopes Bob Will Be Good Buddy for PC Neophytes*, Wall St. J., Jan. 3, 1995, at 5 8

Kenneth W. Dam, *Some Economic Considerations in the Intellectual Property Protection of Software* 25 (Chicago Law & Economics Working Paper No. 26, 2d series, 1994) (forthcoming 1995 in J. Legal Stud.) 2

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Jon S. Wilkins, *Protecting Computer Programs as Compilations Under Computer Associates v. Altai*, 104 Yale L.J. 435 (1994) 2

Introductory Statement

The opposition briefs argue that this case involves primarily a contract dispute and only an application of "traditional copyright law principles." This is fanciful. Respondents ignore the destructive force of the decision below on the protection for computer software mandated by a specific Congressional enactment and the impact of that decision on a pivotal industry in the American economy.

Respondents' portrayal of the issues presented is based on a profusion of misstatements—extending ultimately to suggesting that the decision below would not govern even other cases involving "graphical user interface computer programs" [Microsoft Br. at 1]. That is dangerously wrong. The opinion below categorically states, in terms denigrating ***all*** graphical user interfaces, that "unlike purely artistic works such as novels and plays, graphical user interfaces generated by computer programs are partly artistic and partly functional. They are a tool to facilitate communication between the user and the computer; GUIs do graphically what a character-based interface, which requires a user to type in alphanumeric commands, does manually." 35 F.3d at 1444 (App. at 15A). See also 35 F.3d at 1444-45 (App. at 16A) stating that, "[t]o the extent that GUIs are artistic," there are factors "which limit the range of possible expression in GUIs"—again obviously referring to ***all*** GUIs. Indeed, the opinion stresses that in the Ninth Circuit "the same process" of dissection and filtration of detailed elements leading to only "limited protection" under a virtual identicality standard in this case will be, unless the decision below is reversed, applied to all works in all copyright cases [35 F.3d at 1445-46 (App. 17A, 19A)].

Respondents' characterization of the decision below should not obscure the fundamental fact that the Ninth Circuit has now embraced a radical principle fraught with mischief for both the computer software industry specifically, and the law of copyright more generally—namely,

that a creative work (such as Apple's Macintosh graphical user interface) is not entitled to protection for the work as a whole—i.e., its structure, sequence and organization of individual components—by the traditional substantial similarity standard. *See, e.g.,* Kenneth W. Dam, *Some Economic Considerations in the Intellectual Property Protection of Software* 25 (Chicago Law & Economics Working Paper No. 26, 2d series, 1994) (forthcoming 1995 in J. Legal Stud.) (emphasis added), criticizing the closely related *Computer Assocs. Int'l v. Altai, Inc.* case, 982 F.2d 693 (2d Cir. 1992), as:

> *betray[ing] a fundamental underlying disagreement with the Congressional decision mandate making copyright a means of protecting software . . . [and] overlook[ing] the well-established proposition that a work composed entirely of unprotectable separate elements must nonetheless be protected if those elements are combined in a sufficiently original fashion.*[1]

Ultimately, respondents' misdescriptions should not be allowed to obscure the jarring reality that the employment of the "virtually identical" standard would deprive all computer software, and perhaps other creative works as well, of effective copyright protection [see Pet. at 11-12] and that the decision below thus is a depressing overhang on the computer industry and all other creative industries dependent on copyright protection.

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[1] *See also* Jon S. Wilkins, *Protecting Computer Programs as Compilations Under Computer Associates v. Altai*, 104 Yale L.J. 435, 464 (1994) (citing *Gates Rubber Co. v. Bando Am., Inc.*, 798 F. Supp. 1499, 1516 (D. Colo. 1992), *vacated in part and aff'd in part sub nom. Gates Rubber Co. v. Bando Chem. Indus.*, 9 F.3d 823 (10th Cir. 1993)): "[I]nfringement liability should attach for copying any significant integrated portion of program structure in a way that suggests clear parallels to the original's selection and arrangement. . . . [The *Computer Associates* test has] 'the real potential to eviscerate the application of the prevailing substantial similarity test' for literary works generally . . . ."

I. THIS IS NOT A CONTRACT CASE. TO THE CONTRARY, THIS CASE PRESENTS COPYRIGHT LAW ISSUES OF PROFOUND IMPORTANCE THAT REQUIRE RESOLUTION BY THIS COURT.

Contrary to respondents' chief argument, the issues here presented are pure copyright law questions of great and urgent moment. Those questions should not be obscured by the dispute below as to the proper interpretation of the 1985 Apple-Microsoft agreement. For the purposes of this Court's review, the copyright issues are starkly presented no matter how the 1985 agreement is interpreted and it may be assumed that the courts below correctly interpreted the 1985 agreement.[2]

The use of the license by the courts below to justify downgrading the standard of protection for Apple's work as a whole does, however, crystallize the copyright issues presented. The objective of any kind of idea/expression analysis is to assure that protection is accorded to original expression, not to unprotectible ideas or facts. *See Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977). Utilization of such a process in this case to filter out licensed items from any consideration even though they are highly original and fully qualified for copyright protection ***and thereby to downgrade the standard for protection of the work as a whole*** makes a mockery of that objective and process.

The result, denying protection against a flagrant unauthorized copying of one of the best known creative works in the world, widely acclaimed for the originality of its overall dynamic appearance (its structure and

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[2] Furthermore, contrary to respondents' representations that Apple's claim is based on "material it licensed Microsoft to use" [Microsoft Br. at i], Apple's claim from its inception has been based solely on the unauthorized copying by defendants of Apple's copyrighted Macintosh graphical interface in a use ***exceeding*** the use permitted by the 1985 agreement with Microsoft. See Apple Complaint ¶ 14, CR 1 (Microsoft's work "exceed[s]" Microsoft's license rights).

organization and its sequencing of related images), is flatly inconsistent with the statutory mandate. Indeed, the decision below is a classic case of "los[ing] sight of the forest for the trees." *Atari, Inc. v. North Am. Phillips Consumer Elecs. Corp.*, 672 F.2d 607, 618 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982).[3]

The treatment of licensed elements as if they were unworthy of copyright protection and thereby downgrading the standard for copyright protection is both illogical and in conflict with the "well-settled copyright law" rule cited in *Rano* [see *supra* note 3]. That must be especially the case here, where it is the addition of ***un***licensed material that drastically altered the character and appearance of defendants' works, making them much more similar to Apple's copyrighted work as a whole.[4]

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[3] Neither case cited by Microsoft [at 9-10] justifies that result. In *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465 (9th Cir.), *cert. denied*, 113 S. Ct. 198 (1992), analytic dissection of the plaintiff's work (actually developed by one of the defendants, who retained a license to use the source code) was done at the *plaintiff's* request. The plaintiff made no request for a comparison of the plaintiff's and defendants' works as a whole, no evidence of such a comparison was ever presented and the appellate court found that "[t]herefore, there is no reason we should expect the district court to have made [such an] analysis." *Id.* at 1476. In *Rano v. Sipa Press, Inc.*, 987 F.2d 580 (9th Cir. 1993), the court rejected plaintiff's right to terminate his license grant under California contract law as in conflict with federal copyright law. What is most significant here is that the court noted that, even so, "***[u]nder well-settled copyright law, [plaintiff] would be able to claim copyright infringement if [defendant] exceeded the scope of the licensing agreement***" [*id.* at 586 (emphasis added)]—exactly the case here presented.

[4] *See* 709 F. Supp. at 931 (App. at 34A-35A) ("[I]t cannot be disputed that Windows 2.03 is significantly different from Windows 1.0. And this difference is significant to Apple. . . . Windows 2.03 is more similar in overall visual appearance to the Macintosh visual displays than Windows 1.0.").

II. GRAPHICAL USER INTERFACES (SUCH AS APPLE'S MACINTOSH INTERFACE) ARE CREATIVE WORKS DESERVING OF COPYRIGHT PROTECTION UNDER THE TRADITIONAL SUBSTANTIAL SIMILARITY STANDARD.

The underlying theme of respondents' opposition briefs, echoing the decision below, is that a graphical user interface is more like the factual compilation in *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991), than a creative literary or artistic audiovisual work. E.g., Microsoft Br. at 12. Indeed, HP's opposition emphasizes, as did the decisions below, that graphical user interfaces are only "tools used to operate computers" [HP Br. at 2], "in the same way that . . . the dashboard, steering wheel, gear shift, brakes, clutch and accelerator serve as the user interface of an automobile" [799 F. Supp. at 1023 (App. at 110A); HP Br. at 3]. That characterization is profoundly wrong, both factually and in terms of the governing case law. See Pet. at 14-19.

The cases cited by respondents to buttress their argument that graphical user interfaces are entitled only to protection against virtually identical copying [see Microsoft Br. at 12] only serve to emphasize the error to which respondents led the courts below. It is simply manifest that a computer graphical user interface is ***not*** like a telephone book [*Feist*, 499 U.S. 340]; a compilation of forms and collections of data [*Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197 (9th Cir. 1989)]; a system for playing Scrabble [*Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984)]; a compilation of baseball statistics [*Kregos v. Associated Press*, 3 F.3d 656 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1056 (1994)]; or an encyclopedic compilation of trivial facts [*Worth v. Selchow & Righter Co.*, 827 F.2d 569 (9th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988)]. To the contrary, a graphical user interface is an imaginative, fanciful work valued for its aesthetic quality as well as its informational function. See

Pet. at 15 n.16, 18 n.22, 19 n.23. It is vitally important to the computer industry, and other industries as well, that this Court resolve the dichotomy of those conflicting views consistent with the governing Congressional enactments.

III. THIS CASE IS, IN ALL OTHER RESPECTS AS WELL, AN IDEAL VEHICLE FOR RESOLUTION BY THIS COURT OF THE ISSUES PRESENTED.

Respondents suggest that this case is either unique or dependent on complex facts. Neither argument withstands scrutiny.

Factually, the case is ideally situated for review by this Court. The grand scale of the copying by defendants is evident beyond challenge.[5] Respondents' selective focus on the words used to describe isolated similarities, wrenched from their context, only emphasizes the inevitable error that must follow a dissection of any creative work into its most elemental details. *See* Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 Harv. L. Rev. 977, 1006 (1993) ("Any process that atomizes a work runs the risk of reducing it to a collection of unprotectable elements and may ignore the synergism inherent in the combination of its constituent elements.").[6] Respondents'

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[5] Microsoft admitted in its 1985 agreement that "visual displays in [Window's 1.0] are derivative works of the visual displays generated by Apple's Lisa and Macintosh graphic user interface programs" [CR 470 (Ex. B, ¶ 1)]. It is clearly established and undisputed that respondents' later works were altered by the inclusion of unlicensed graphical material making the later works much more similar to the Macintosh. See *supra* note 4.

[6] Respondents assert that "Apple itself determined the level at which 'dissection' was to occur" [Microsoft Br. at 13]. That is untrue. Apple always defined its infringement claim in terms of the "overall appearance" of defendants' products. CR 361, ¶¶ 1, 4. That was acknowledged by both of the trial judges who ruled on the merits of the case. CR 152, at 20, 25; CR 661, at 90; CR 734, at 25, 27. See also CR

argument ignores the crucial fact that the decision of the court of appeals bypassed all such detail in order to review only the "district court's *approach*." 35 F.3d at 1438 n.5 (App. at 3A). That alone permits a clear and simple presentation and uncomplicated consideration of the copyright questions that require review and resolution by this Court.

Respondents' attempt to make it appear that Apple's Macintosh interface was "taken" from Xerox's Smalltalk and Star likewise is no more than an irrelevant smoke screen. The most that can be deduced from respondents' biased accounts (ignoring the wealth of evidence proving independent creation of Apple's distinctive, unique implementation of the desktop metaphor idea [see Appendix Part III.1 (at 200A-203A)[7]]) is that some of Apple's designers were inspired by the general ideas pioneered, in rudimentary fashion, by Xerox. That is not enough to justify diminution of Apple's claim nor complicate the review sought by this Court in any way. See the rejection of respondents' argument asserting lack of originality in 759 F. Supp. at 1455 (App. at 67A-68A). See also *Xerox Corp. v. Apple Computer, Inc.*, 734 F. Supp.

349, at 13 (granting defendants' motion to require Apple to file a list in greater detail).

[7] Respondents criticize Apple's submission of an evidentiary appendix as "deposition snippets and redacted and juxtaposed document excerpts . . . not part of the record of this case" [Microsoft Br. at 23; HP Br. at 20 n.10]. Contrary to the implication of respondents' criticism, every evidentiary item included is in the record of this case (with precise citations as to every item). Moreover, each item is fairly presented (and fully presented, consistent with the need for brevity). While the court of appeals denied Apple's request to submit an evidentiary appendix to supplement its brief, such an appendix is permitted here by Rule 14.1(k)(v) of the Rules of this Court and its utility (particularly to avoid irresponsible controversy as to the factual material of record) is evident.

1542, 1552 (N.D. Cal. 1990) ("Xerox does not even allege that Apple copied the Star work."), subsequently dismissed on stipulation (Order of May 31, 1990), and the admission by HP [at 11] that the originality of Apple's works is "not in dispute."

Respondents' alternative attempt to suggest that the similarities between defendants' works and Apple's works were due to limited design alternatives [e.g., HP Br. at 12-13] similarly falls short of adding any complication to consideration by this Court of the copyright issues presented. Respondents' unsupported contention that some unspecified, theoretical imposed constraints required respondents to make their works so similar to the Macintosh interface (described by one of Microsoft's largest customers as the "gold standard" of the industry [CR 472 (Schreiber)]) is no more plausible than would be a contention that there is only one way to paint a landscape.[8] It does show, however, the reach of respondents' arguments, and of the decision below, to all graphical user interfaces.

Finally, respondents apparently see less conflict among the lower court decisions than what the commentators and the courts themselves have perceived. It is true enough that the decisions below are not unique in evincing hostility to the protection of computer

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[8] Even as to the assertion by HP [at 8 n.6] that windowing systems provide a choice of only overlapping or tiled windows (citing an unsupported comment by the court of appeals to that effect [35 F.3d at 1444 (App. at 15A)]), the uncontradicted record is that there are many alternatives, including, among others, full screen windows with rapid switching; cascading or stacking windows; piles of windows; rooms of windows; flipping as through sheets of paper or through pages in a book; and alternative shapes for windows not in use. Shneiderman Decl. (CR 227) (App. at 225A-227A); Atkinson (CR 728) (App. at 234A-235A). Indeed, Microsoft recently introduced a new interface called "Bob" for use in home computers that uses images of rooms in a home instead of windows. *See* Don Clark, *Microsoft Hopes Bob Will Be Good Buddy for PC Neophytes*, Wall St. J., Jan. 3, 1995, at 5.

software mandated by the Software Protection Act of 1980.[9] But judicial infidelity to a Congressional directive only reinforces the need for resolution of the issues presented. And the key fact remains that the different opinions in the different cases in various lower courts[10] are widely perceived as creating an unstable marketplace, creating confusion and alarm in the computer industry and slowing down the innovative activities of both large and small companies.[11]

At a minimum, reconciliation and clarification is needed as to the reach of this Court's *Feist* decision in adjudicating the extent of copyright protection for the nonliteral aspects of creative works such as Apple's audiovisual works as compared with compilations such as the used car Red Book compilation recently granted copyright protection in *CCC Info. Servs. v. Maclean*

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[9] *See* Jack E. Brown, *"Analytical Dissection" of Copyrighted Computer Software—Complicating the Simple and Confounding the Complex*, 25 Ariz. St. L.J. 801, 815-17 (1993).

[10] Among other differences, other courts have not adopted the extreme level of dissection approved by the decision below. *See, e.g.*, among the "dissection" cases cited by Microsoft, *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 535 (5th Cir.) (analyzing program at "the intermediate levels of abstraction, consisting of such factors as the structure, sequence, and organization of a copyrighted work"), *cert. denied*, 115 S. Ct. 82 (1994); *Engineering Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1346 (5th Cir. 1994) (defendants' "arguments construe *Feist* both too broadly and too narrowly" because the interface's formats "do not consist of mere 'facts,' nor do they portray a 'compilation'"); *Concrete Machinery Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 608 n.8 (1st Cir. 1988) (noting, in the footnote to the text quoted by Microsoft, that: "As an example of where dissection was improperly used, *see Apple Barrel Productions Inc. v. Beard*, 730 F.2d 384, 387-88 (5th Cir. 1984) (holding district court erroneously failed to consider copyrighted show as a whole).").

[11] *See* Steering Committee for Intellectual Property Issues in Software et al., National Research Council, *Intellectual Property Issues in Software* 58-60 (1991).

Hunter Mkt. Reports, 33 U.S.P.Q.2d (BNA) 1183, 1190-93 (2d Cir. Dec. 5, 1994).

Conclusion

For the reasons stated in Apple's petition, the writ requested should be granted.

Respectfully submitted,

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